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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No.

HAROLD S. RODOVICH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, Harold S. Rodovich, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of conviction entered by the United States District Court for the Southern District of Florida at Miami.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix to this Petition, App. 1a-4a[1].

[1] App. refers to the appendix to this petition which contains the opinion of the Court of Appeals. The printed appendix in the court below which contains the complete record in the District Court will be referred to as J.A.

JURISDICTION

The judgment of the Court of Appeals was entered on February 22, 1972. A timely Petition for Rehearing was denied without opinion on March 21, 1972. By Order of April 20, 1972, Justice Powell extended the time for filing the Petition for Certiorari to and including May 20, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS TO BE PRESENTED FOR REVIEW

1. Whether the government's instigation of and participation in the counterfeiting offenses committed by the petitioner constituted the manufacturing of crime by the law enforcement officials requiring dismissal of the prosecution irrespective of the character or predisposition of the petitioner.

2. Alternatively, whether given uncontradicted evidence of government inducement condemned by this Court in *Sorrells* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958), the government met its burden to escape a finding of entrapment as a matter of law by eliciting a single episode of similar criminality to prove predisposition.

3. Whether the use for impeachment purposes of a prior conviction then void under the law of the convicting state by reason of a full pardon deprived petitioner of due process of law where the use might well have influenced the outcome of the case.

CONSTITUTIONAL PROVISIONS INVOLVED

Fifth Amendment

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in

the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

STATEMENT OF THE CASE

INTRODUCTION

Petitioner Harold Rodovich and three co-defendants, Joe Russo, Arthur C. Wade and Hassan H. Holet, were charged in a six-count indictment with conspiracy to violate the counterfeiting laws and substantive counterfeiting offenses in violation of 18 U.S.C. §§ 371, 472 and 473. Two counterfeiting transactions were involved, one completed on October 1, 1970, and one arranged for November 10, 1970, but aborted by the arrest of the defendants. After trial by jury, petitioner and the other defendants were convicted on Count I charging a conspiracy covering the period October 1 to November 10, 1970. Petitioner was also convicted on Counts II and III charging him alone with possessing and delivering $2660 of counterfeit on October 1, 1970.[2] On June 9, 1971, petitioner was sentenced to concurrent terms of 5, 10 and 10 years on each count.

Petitioner did not deny that he possessed and passed counterfeit money on October 1, 1970, and participated

[2] Counts IV and V charging petitioner and the three others with attempting to conceal and attempting to transfer $250,000 of counterfeit money on November 10, 1970, were dismissed by the trial court. Defendant Russo was also convicted of Count VI charging him with possessing two counterfeit twenties found in his pocket on November 10, 1970. This petition involves only Rodovich.

in the aborted November 10 transaction, but defended on the grounds that he was entrapped into this activity by government agents. The principal participants in the activities relevant to entrapment are four in number—the petitioner, the informer, Michael Calarusse, and two government undercover agents, Richard Ward and James D'Amelio. The following facts were developed at the trial through the testimony of government agents and the petitioner; the informer, although present, was not called to testify.

TRIAL

A. Agent's Testimony

In September 1970 petitioner and Michael Calarusse passed counterfeit money in the state of Connecticut and were arrested. (JA. 536-37, 541-42) Subsequent to his arrest and before his return to Florida, Calarusse became a government informer. (JA. 394-95) On September 22, 1970, he returned to Miami and was met at the airport by secret service agents who had been informed of his arrival by their Connecticut office. (JA. 391, 398) The agents discussed petitioner with Calarusse at that time. (JA. 391-92) A few days later, they asked him to determine if petitioner had any counterfeit money left and to arrange for a sale of counterfeit money. (JA. 394) The agents put no limitations on what Calarusse should say or do to arrange the sale. (JA. 396, 439) All contacts between the government and the petitioner arranging for the initial transfer of counterfeit were made through Calarusse. (JA. 440) At no time did the government monitor or seek to preserve any of the conversations between the informer and petitioner. No electronic surveillance and recording was undertaken, and no one even listened to Calarusse's end of conversations when those conversations ema-

nated from secret service offices. (JA. 164 ,174-75, 187, 441, 452-53) According to the government agents, the informer Calarusse was motivated by a hope of reward if his information was fruitful (JA. 463-64) and he was apparently paid for his information on the basis of its value.[3] (JA. 412-13) He was given an official status with his own number. (JA. 393)

On the 28th of September, Calarusse reported that Rodovich was ready to transfer counterfeit. (JA. 400-01) The agents made no efforts to determine what transpired from the 22nd to the 28th between Calarusse and the petitioner to get petitioner in that position. (JA. 174-75, 407-08) On the 28th of September, Calarusse was instructed to find out the amount available and to report back. On the 29th, Calarusse did report back and the agents instructed him to proceed to set up the buy. (JA. 400-03) On the 1st of October, Calarusse called Rodovich in the presence of secret service agents but out of earshot, to make the final arrangements. (JA. 396, 404) Later that day, Calarusse met with petitioner in the prearranged place, a local bar, and introduced him to the buyer, undercover agent Ward, using the name "Louie." (JA. 117-131)

Although other agents were on the scene observing, the secret service had predetermined that no arrest would be made for the October 1 transfer. (JA. 253-54) The express purpose of the transfer was, if possible,

[3] The evidence on payment is conflicting, one agent admitting it, (J.A. 412-13) the other denying it. (J.A. 462). These same agents gave conflicting testimony on who was in charge of the operation, each naming the other. (JA. 417, 435) Undeniably Calarusse operated in expectation of reward which may have been money or may well have been dismissal of the Connecticut action against him.

to set up another larger transaction. (JA. 406, 482-83) A transfer of $2660 counterfeit was made on October 1 by petitioner in exchange for $950 in real money. (JA. 117-31) Significantly, the government agent testified that he assured Rodovich that Calarusse would be taken care of in the deal. (JA. 461-62) Petitioner had been holding $600.00 of the counterfeit for Calarusse. (JA. 461) After the transfer, a discussion ensued between agent Ward and Rodovich about a future transaction and a tentative agreement was reached. (JA. 126)

As a direct result of the October 1st transfer set up by Calarusse, a larger transaction was planned for November 10, 1970. (JA. 172, 482-83) The agents testified to meetings and conversations between petitioner and undercover agent Ward and the other undercover agent, D'Amelio, who had been falsely represented to petitioner as an out-of-state purchaser of counterfeit money. (JA. 131) These contacts between October 1 and November 10 were initiated both by the government undercover agents and Rodovich. (JA. 132) During this period, petitioner indicated that he was arranging for the transaction with out-of-town people and negotiated the details of his transaction and bargain with Ward and D'Amelio. (JA. 126, 175-76, 211-14)

The November 10 transfer was to take place at the Miami International Airport upon details worked out by Rodovich with the agents. Although at the last minute Rodovich indicated the exchange would have to take place elsewhere, the undercover agents refused to leave (obviously because the airport was staked out) and prevailed. Petitioner waited with agents Ward and D'Amelio at a bar at the airport. He left them and was seen to meet Russo and Holet who had

been driven to the airport by Wade. Russo and Holet had a suitcase which was placed in a locker and subsequently found to contain counterfeit money. Petitioner brought Ward to the locker, they opened the counterfeit suitcase and then he went with Ward and D'Amelio to get the genuine buy money. Russo and Holet followed them closely and were joined by defendant Wade and all of them including the undercover agents were arrested before the actual transfer took place. (JA. 136-40, 312-20)

B. Petitioner's Testimony

1. Direct Examination—Inducement

Petitioner took the stand to testify to meetings and conversations between himself and Calarusse which caused him to be involved in the counterfeiting transactions. He testified that Calarusse, whom he thought to be his friend, came to his home in late September seeking money. (JA. 520) Calarusse told petitioner that he desperately needed the money to keep him and his family from being evicted from their home and to feed his children. (JA, 520-21) Moreover, Calarusse told petitioner he had made a loan from a loan shark and that he would be "in real trouble" if he did not pay it back soon. (JA. 526) He attempted to borrow money from petitioner who did not have enough funds to lend. (JA. 526) He then asked the petitioner to engage in a counterfeit transaction and the petitioner flatly refused, replying he "didn't want to get involved in it." (JA. 526) Calarusse continued to request and beseech petitioner over a period of a few days and finally as a direct result of these entreaties petitioner agreed to participate in the counterfeit transaction. (JA. 526-27)

1. Cross Examination—Impeachment and Predisposition

Under cross-examination, petitioner testified to his involvement with Calarusse in counterfeit transactions in Connecticut earlier in September. (JA. 536-37) Moreover, over the objection of petitioner's counsel, the government elicited from petitioner the fact of a previous felony conviction. Because of its importance to this petition, the precise colloquy on the disputed impeachment follows:

> Q (By Mr. Ullman) Did you have any [631] other counterfeit money at any place other than Connecticut at the time you got to Connecticut?
> A No.
>
> Q Have you ever been convicted of a felony?
> A No.
>
> Q. You never have been convicted of a felony?
> A No.
>
> MR. SANDSTROM:
>
> May I excuse the jury a moment?
>
> THE COURT:
>
> Let the jury out.
>
> (Thereupon the jury withdrew, and the following proceedings were had with the jury absent:)
>
> MR. SANDSTROM:
>
> The answer as just given is on direct advice of counsel, on the basis that at one time he was convicted and he has obtained a full pardon therefrom, wiping out the conviction ab initio.
>
> THE COURT:
>
> Well, nevertheless so what? You want to change your statement?

MR. SANDSTROM:

No, sir. I just wanted to make it clear to the Court that at one time [632] there was one and he had had a full pardon therefrom.

THE COURT:

Well you didn't need the jury to go out for that did you? Because he's apparently going to impeach him.

MR. SANDSTROM:

That's the reason we object.

THE COURT:

He has a right to impeach from this, because he has made a misstatement. He could have said, "I was convicted of a felony but I was subsequently pardoned."

MR. SANDSTROM:

That was my direction, to tell him "No" because the effect of a pardon is to wipe it out ab initio the same as if it never existed.

THE COURT:

Well, this just isn't so as far as impeachment is concerned. You can put all this evidence before the Court.

(JA. 538-39)

The government presented no rebuttal to petitioner's testimony of inducement by Calarusse, except the cross-examination on predisposition—the Connecticut counterfeiting episode. Although Calarusse was present and under subpoena, the government did not call him to refute petitioner's testimony. The trial court denied petitioner's motions for judgment of acquittal and submitted the entrapment issue to the jury. (JA. 552)

COURT OF APPEALS HOLDING

On appeal, petitioner urged that the evidence established entrapment as a matter of law entitling him to a judgment of acquittal and that the impeachment by a prior pardoned conviction constituted a denial of due process and a deprivation of a fair trial. (Brief for Appellant, 5-13, 34-37) On the entrapment issue, the Court of Appeals held:

> Rodovich was not, as a matter of law, entrapped. There was sufficient evidence of governmental inducement to put upon it the burden of proving that the inducement did not overpersuade or undermine the will of an unwilling man. But the evidence of predisposition, in the form of passing counterfeit money during the trip to Connecticut, was sufficient to carry the entrapment issue to the jury. *Pierce* v. *U.S.*, 414 F.2d 163 (5th Cir.) cert. denied, 396 U.S. 960, 24 L.Ed.2 (1969). Slip opinion at 3-4, App. 3a.

The Court of Appeals did not discuss the impeachment issue in its opinion affirming the conviction. (App. 4a)

REASONS FOR GRANTING THE WRIT

1. Since the judicial creation of the entrapment defense in 1915,[4] courts have struggled to strike the proper balance between two focuses of concern—the government participation producing the crime and the accused's predisposition to commit the crime. As noted in *Lopez* v. *United States,* 373 U.S. 427 (1963), the problem has "sharply divided" this Court. *Id.* at 434. The divisions reflected in *Sorrells* v. *United States,* 287 U.S. 435 (1932) and *Sherman* v. *United States,* 356 U.S. 369 (1958) continue to afflict lower federal

[4] *Woo Wai v. United States,* 223 F. 412 (9th Cir. 1915)

and state courts today, resulting in inconsistent decisions and unpredictability in litigation.

Courts following the *Sorrells* majority recognize the evils of overzealous law enforcement but limit the availability of the entrapment defense to "innocents" or those not "predisposed" to crime. 287 U.S. at 451. The *Sorrells* dissent and *Sherman* concurrence, based on the recognized power of a court to protect itself against contamination by unlawful police conduct, looks solely at the government activity. If the police conduct "falls below standards, to which common feelings respond, for the proper use of government power," then the court should dismiss the prosecution irrespective of the character or predisposition of the accused. *Sherman* v. *United States*, 356 U.S. 380-82 (Frankfurter, J. concurring).

Lower courts are continually faced with defendants about whom the government can show some degree of predisposition for and receptivity to crime. A person asserting the entrapment defense admits he committed the criminal conduct, and thus cannot be truly innocent. Moreover, the government rarely, if ever, directs its undercover agents and informers against an individual unless it has some information indicating prior criminal tendences. Thus, state and federal courts faced with intolerable creative criminal activity by the government and a predisposed accused must make a choice. They can strain to avoid the innocence requirement of *Sorrells* by creating a new defense or by effectively reading predisposition out of entrapment, or they can rigidly adhere to precedent and condone the misconduct. Because courts have reacted differently, the availability of the entrapment defense to identically predisposed defendants varies

between jurisdictions and even within the same jurisdiction. Individuals subjected to comparable impermissible government inducement and involvement may have entrapment foreclosed to them without adequate analyses if a judge or panel of judges elects to apply the *Sorrells* precedent.

In *Lopez, supra*, after noting that the appropriate balance between the focuses remains an open question, Justice Harlan stated the gravamen of the entrapment defense:

> The conduct with which the defense of entrapment is concerned is the manufacturing of crime by law enforcement officials and their agents. 373 U.S. at 434.

This petition presents an instance of uncontradicted evidence of the manufacture of crime by the government answered only by a single episode of similar criminal conduct by the accused to prove predisposition. As such, it presents a vehicle for the court to provide desperately-needed clarification of the relationship between the two focuses of the entrapment defense.

The Ninth Circuit and the Fifth Circuit out of which this case arises exemplify the present uncertain state of the law. Both Circuits have opinions adopting the position that government inducement or involvement and innocence or lack of predisposition are dual prerequisites to entrapment. *Pierce* v. *United States*, 414 F.2d 163 (5th Cir. 1969) and *United States* v. *Walton*, 411 F.2d 283 (9th Cir. 1969). Yet both Circuits in particular circumstances have declined to follow these holdings and disregarded the element of an innocent accused.

Greene v. *United States*, 454 F.2d 783 (10th Cir. 1971), involved violation of federal liquor laws. In brief, a government agent contacted the defendants shortly after their arrest on earlier bootlegging charges in order to reinstitute prior activity. For an extremely long time, two and one-half years until the next arrest, the agent was substantially involved in the bootlegging operation, treating the defendants as partners, offering to buy equipment and actually providing 2,000 pounds of sugar. The court found that the agent reestablished a criminal enterprise that had been terminated by arrest and was its only customer during the two and one-half years of its subsequent operation. Given the *Greene* defendants obvious predisposition, the court recognized that the traditional entrapment defense was not applicable if predisposition foreclosed its operation. 454 F.2d at 786. Yet the aggravated nature of the government conduct led the court to hold under its supervisory power that such creative activity could not be countenanced. A reversal for dismissal of the indictment was required. *Id.* at 787.

This decision was presaged by the California District Court holding in *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970). In *Chisum*, a government agent became aware that an accused desired counterfeit money. The agent supplied the counterfeit and subsequently arrested the accused for receiving it. The court found entrapment violative of the Due Process clause despite the admitted predisposition, holding:

> When the government supplies the contraband, the receipt of which is illegal, the government cannot be permitted to punish the one receiving it. To permit the government to do so would be to countenance violations of justice. As Justice

> Roberts stated in *Sorrells*, "It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law." 287 U.S. at 457, 53 S.Ct. at 218 (separate opinion). 312 F. Supp. at 1312.

In *Williamson* v. *United States*, 311 F.2d 411 (5th Cir. 1962), the Fifth Circuit held that a contingent fee arrangement whereby an informer was paid when he made a case against an individual constituted entrapment despite an accused strongly predisposed to criminality. *Id.* at 444. And in *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971), a narcotics case where the government supplied the heroin which the accused subsequently sold, the Fifth Circuit found entrapment despite the ready compliance of the accused and his willingness to participate in further crime. *Id.* at 906.

In *Russell* v. *United States*, 11 Cr.L. 2108 (9th Cir., decided April 6, 1972), the Ninth Circuit succinctly counterpointed the *Bueno-Chisum* approach with the holding in *Greene* and recognized each as a modification of the traditional entrapment defense. In *Russell*, the court found that the government had supplied a chemical to the accused without which he could not have illegally manufactured methamphetamine. As the court noted, the accused conceded "he may have harbored a predisposition" to commit the crime but still urged the entrapment defense. The court observed,

> We need not resolved the precise issue apparently presented by the parties. For regardless of the significance of "predisposition" as an element in "entrapment" we conclude that there is merit in Russell's contention that a defense to a criminal charge may be founded upon an intolerable degree of governmental participation in the criminal enterprise. Two theories for this defense have been

advanced. Placing the defense within the ambit of the entrapment doctrine was the approach taken by our learned Brothers of the Fifth Circuit in United States v. Bueno, 447 F.2d 903 9 CrL 2397 (5th Cir. 1971,) and by District Judge Ferguson in his very carefully written opinion in United States v. Chisum, 312 F. Supp. 1307, 7 CrL 2159 (C.D. Cal. 1970).

* * *

The Government, in effect, contends that we are not free to adopt the Bueno-Chisum reasoning. Assuming, arguendo, that the Government is correct in its assessment of Walton, supra, as limiting the applicability of the "entrapment" defense to instances in which the defendant had no predisposition to commit the crime, an approach other than that relating to the strict "entrapment" defense requires reversal.

* * *

[Discussion of Greene v. United States, supra omitted]

Apparently, the only difference between Bueno and Chisum, as distinguished from Greene, is the label affixed to the result. Both theories are premised on fundamental concepts of due process and evince the reluctance of the judiciary to countenance "overzealous law enforcement". We do not choose to affix a label to our result; hence, we need not select between the alternative theories. Here, both compel the same disposition. 11 CrL at 2108.

Thus, both the Fifth and the Ninth Circuits, when confronted with impermissibly over-zealous law enforcement, disregard the obvious willingness of the accused to commit his crime and dismiss the prosecution because of the government's misconduct. The Fifth Circuit's *Bueno* and *Williamson* holdings accomplishing this under the entrapment defense contradict its own holding in *Pierce* v. *United States, supra*

adopting the majority opinion in *Sorrells*. The Ninth Circuit does not directly contradict itself in that it creates a new defense under its supervisory power barring prosecutions resulting from intolerable creative activity by government agents. Whether done in the name of entrapment or as a new defense, these holdings are in conflict with the majority opinions in *Sorrells* and *Sherman* although consistent with the prohibition of government manufactured crimes referred to by Justice Harlan in *Lopez*. Various other courts have used different approaches to temper the strict innocence requirement of *Sorrells*. Some apply *Sorrells'* language when the facts indicate predisposition.[5] Others appear to use the approach of the *Sorrells* majority and dissent alternately.[6] Given this state of the law, guidance from this Court is necessary to declare unequivocally that government activity creating crime can become so intolerable as to be grounds for dismissal of an indictment irrespective of the predisposition of the accused to commit the crime.

A review of the uncontradicted testimony of the petitioner and the government agents reveals a course of conduct by the government in this case far below acceptable and easily attainable standards of effective law enforcement. The government instructed an official informer, a friend of petitioner, to involve petitioner in a counterfeiting offense. This effort was instituted shortly after similar prior criminal activity by both the informer and petitioner had been curtailed by arrest. No sooner did the government arrest the informer and petitioner for committing a crime than

[5] See, *e.g.*, *United States v. Campbell*, 235 F. Supp. 190 (E.D.N.Y. 1964); *United States v. Kros*, 296 F. Supp. 972 (E.D.Pa. 1969).

[6] See, *e.g.*, *United States v. Morrison*, 348 F.2d 1003 (2d Cir.) cert. denied, 382 U.S. 905 (1965).

it employed the informer to attempt to repeat the same crime with the petitioner.

With the knowledge of the government, the informer embarked on his activity with the expectation of reward contingent upon successful performance. The reward expected may have been money or dismissal of the pending charge against him, or both. Apparently, he was rewarded.

All the arrangements for the initial transaction, the critical one for the question of entrapment, were between the informer and petitioner. The government agents did not limit what the informer should say or do to arrange for the crime. Not only was no attempt made to preserve conversations between the informer and petitioner, but government agents avoided listening to the informer's end of the conversation when he called in their presence. The agents also never informed themselves as to what had been said to arrange the October 1 transaction.

The informer who created the crime relied on his friendship with petitioner and repeated appeals invoked in the name of the welfare of his family and personal safety to overcome petitioner's initial refusal to become involved. The government instigated and participated in the October 1 transfer as purchaser with no intention to arrest; the express purpose of manufacturing the crime was to arrange for a larger second crime. Yet another government agent participated in the negotiations with petitioner in the second transfer as purchaser.[7]

[7] Petitioner's willingness to participate in a second transfer is of no consequence if the first transaction was the result of impermissible inducement. The second was clearly a direct product of the first. *Sherman v. United States*, 356 U.S. at 374. (J.A. 172, 482-83)

The government's failure to instruct or monitor its informer cannot purge the prosecution of the taint of his activity. *Sherman* v. *United States*, 356 U.S. at 373. The informer was a government agent and the government is not relieved of responsibility for his actions either by saying "we didn't tell him to do it" or by deliberately keeping uninformed on his behavior. If the informer did not induce petitioner in the manner petitioner testified, the government had a duty to call the informer to testify. *United States* v. *Bueno*, 447 F.2d 906 (5th Cir. 1971).

Whether by modifying *Sorrells* and *Sherman* or by an exercise of supervisory power over federal criminal trials, the Court should grant this writ to state that the creative criminal activity by the government agents and informer went beyond that point where a court must refuse to adjudicate the resultant crime irrespective of the predisposition of the accused. As Justice Frankfurter stated in his *Sherman* dissent, "[w]hat police conduct is to be condemned . . . must be picked out from case to case as new situations arise. . . ." 356 U.S. at 384. No single, unique factual situation has motivated the courts which have disregarded the *Sorrells* innocence requirement. In *Chisum*, *Bueno* and *Russell* it was the government supplying the defendant with the item whose possession constituted the crime; in *Greene* it was reactivating criminal conduct after an arrest, and subsequent extended and active involvement in the criminal conduct; and in *Williamson* it was the contingent fee arrangement with the informer. In this case the government instigated new criminal activity shortly after the arrest of the petitioner by employing his co-defendant and friend as an informer; the agents knew the informer was acting in hope of

reward and subsequently rewarded him; the informer used his friendship and personal appeals for sympathy to overcome petitioner's initial resistance to the criminal solicitation; and finally, the agents participated as active parties in the counterfeiting crime they created in order to produce and participate in a second, larger crime. "Law enforcement does not require methods such as this." *Sherman* v. *United States*, 356 U.S. at 376.

2. Alternatively, the Court should grant this writ because the Court of Appeals holding is in conflict with *Sherman* v. *United States*, *supra*, and the Fifth Circuit's own decision in *United States* v. *Bueno*, *supra*. The Court of Appeals held that the evidence of government inducement shifted the burden to the government but found that burden discharged sufficiently to take the case to the jury by the single prior episode of passing counterfeit in Connecticut. Slip op. 3-4, App. 3a). In *Sherman* v. *United States*, involving narcotics violations, the government relied on two previous convictions for sale and possession of narcotics as evidence of predisposition sufficient to raise a jury question. This Court held that evidence insufficient to overcome evidence of inducement no more aggravated than present here.

As the Fifth Circuit said in *United States* v. *Bueno*, where neither party produced the informer:

> If the Informer's testimony would tend to disprove the Defendant's story, it was up to the government to produce him. The Defendant having testified to facts which establish a defense as a matter of law, the government has a duty to come forward with contrary proof if it is to carry its ultimate burden of proving guilt beyond all reasonable doubt. 447 F.2d at 906.

While petitioner had experience with counterfeit shortly before the October 1 transaction induced by Calarusse and he exhibited facility in the counterfeiting negotiations subsequent to October 1, he was clearly no more predisposed and no less innocent than the defendant in *Sherman* where this Court found entrapment as a matter of law, or the defendant in *Bueno* where the Fifth Circuit found evidence of willingness alone insufficient to sustain the governments burden.

3. In *Loper* v. *Beto*, U.S. , 10 Cr.L. 3122, (decided March 22, 1972), this Court answered in the affirmative the question:

> Does the use of prior void convictions for impeachment purposes deprive a criminal defendant of due process of law where their use might well have influenced the outcome of the case. 10 Cr.L. at 3124.

In *Loper* v. *Beto*, the prior convictions were constitutionally invalid under *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) because they were obtained in a court that denied the defendant a lawyer. This petition presents the important question not previously decided by this Court whether prior felony convictions, void under state law by reason of a full pardon, may be used to impeach a defendant in a federal criminal trial. The holding of the Court of Appeals affirming petitioner's conviction and thereby approving such impeachment is in conflict with this Court's decisions in *Loper* v. *Beto*, decided after the Court of Appeals decision, and *Ex Parte Garland*, 71 U.S. (4 Wall) 333 (1867), which articulated the scope and effect of a full pardon.

In the course of holding unconstitutional an Act of Congress which prohibited anyone from being admitted as an attorney to United States courts unless he could

swear he had never voluntarily borne arms against the United States or supported a hostile authority within the United States, the Court in *Ex Parte Garland* had occasion to consider the scope and effect of a Presidential pardon which had been granted Mr. Garland for such activities. The Court stated:

> Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offence and the guilt of the offender; and when the pardon is full, it releases the punishment and blots out of existence the guilt, so that in the eye of the law the offender is as innocent as if he had never committed the offence. If granted before conviction, it prevents any of the penalties and disabilities consequent upon conviction from attaching; if granted after conviction, it removes the penalties and disabilities, and restores him to all his civil rights; it makes him, as it were, a new man, and gives him a new credit and capacity.

Other decisions of this Court have reaffirmed the expansive scope of a full pardon. See *United States* v. *Klein*, 80 U.S. (13 Wall) 128 (1871); *Osborn* v. *United States*, 91 U.S. 474 (1875); *Boyd* v. *United States*, 142 U.S. 450 (1892); *Young* v. *United States*, 97 U.S. 39 (1877); and see *Ex parte Wells*, 59 U.S. 307 (1855).

The State of Florida, where petitioner was previously convicted and where he received his pardon, has expressly adopted the scope of a full pardon explicated in *Ex Parte Garland* both by judicial decision, *Singleton* v. *State*, 18 Fla. 297, 21 So. 21 (1896) and a Supervisory Opinion to Governor, 14 Fla. 319. It did so in the following language:

> It is settled law that the pardon of an offense not only blots out the crime committed, but removes all

disabilities resulting from the conviction. "Imprisonment and hard labor are not the only punishments which the law inflicts upon those who violate its commands. Besides these are disabilities which are the consequences of conviction, and which remain after incarceration has ceased. A pardon is supposed to be granted to one who has been improperly convicted, or who has sufficiently expiated his offense. If it was only efficacious when the party was in duress, its effect would only be a halfway relief. The doctrine, now well recognized, upon this subject, is that a pardon gives to the person in whose favor it is granted a new character, and makes of him a new man. When extended to him in prison, it relieves him, and removes his disabilities. When given to him after his time of imprisonment has expired, it removes all that is left of the consequences of conviction,—his disabilities." *State* v. *Baptiste*, 26 La. Ann. 134. 21 So. at 22.

While this Court has not considered this precise question, those courts which have generally conclude that using a pardoned conviction to impeach is proper. Thus, for example, in *Richards* v. *United States*, 89 U.S. App.D.C. 354, 192 F.2d 602 (1951), cert. den. 342 U.S. 946 (1952), the United States Court of Appeals for the District of Columbia, over a dissent by Judge Charles Fahy, held that a general pardon granted by President Truman for all persons who honorably served in World War II regardless of prior guilt or innocence did not create any exception to the general rule permitting impeachment by prior convictions. See *Gurleski* v. *United States*, 405 F.2d 253, 266 (5th Cir. 1968), cert. den. 395 U.S. 977 (1969) (a full pardon by State of Texas did not bar use of pardoned conviction for impeachment in the United States District Court of Texas.)

These decisions predated *Loper* v. *Beto*, however, and did not involve a pardon by a state like Florida which affords its executive's exercise of clemency the broadest scope and effect. In this context, the reasoning of the majority in *Richards* v. *United States, supra*, distinguishing the language of *Garland* which naturally read would seem to bar impeachment by a prior pardoned conviction is significant. The *Richards* court reasoned that this Court's holding in *Carlesi* v. *New York*, 223 U.S. 51 (1914) to the effect that a Presidential pardon does not prevent a state from considering the pardoned conviction in a sentencing under the habitual offender statute, "demonstrates that a pardon does not 'blot out guilt' in any literal or uncritical sense." 192 F.2d 607.

As Judge Fahy pointed out in his dissent in *Richards*, this Court's *Carlesi* holding was strictly limited. The Court stated:

> The issue is a narrow one, and involves not the determination of the operation and effect of a pardon within the jurisdiction of the sovereignty granting it, but simply requires it to be decided how far a pardon granted as to an offense committed against the United States operates, so to speak, extraterritorially as a limitation upon the states, excluding them from considering the conviction of a prior and pardoned offense against the United States in a prosecution for a subsequent state offense. 233 U.S. at 57.

Carlesi did not purport to resolve either the scope of a Presidential pardon in federal court or the scope of a state pardon accorded equal breadth.

Moreover, in light of this Court's amplification of the incidents of void convictions in *Loper* v. *Beto* and *Burgett* v. *Texas*, 389 U.S. 109 (1967) coupled with

the statutory full faith and credit to be accorded a Florida pardon,[8] the reasoning of *Richards* and related cases relying on *Carlesi* no longer obtains. This Court's holding in *Burgett* that a conviction void because of a *Gideon* violation cannot be considered by a state sentencing court under its habitual offender statute is also the law in Florida with respect to convictions void by pardon. In *Fields* v. *State*, 85 So.2 609 (1956), the Supreme Court of Florida specifically declined to follow *Carlesi*. Reaffirming that in Florida full pardon "removes all that is left of the consequences of conviction," the court held that a felony conviction for which the offender has received an unconditional pardon cannot be counted as a prior felony under the provisions of our habitual offender laws." 85 So.2d at 611.

The Florida Supreme Court has not specifically held that a full pardon precludes impeachment. It has held, however, that a pardon operated to remove any disability to testify attached by a felony conviction. *Singleton* v. *State, supra* at 23. This Court has similarly held. *Boyd* v. *United States*, 142 U.S. 450, 453 (1892). Logically, since distrust of the truth-telling of a convicted felon was the basis for the disability and is now the basis for the residual of incapacity—impeachment by prior conviction—a similar result should attach.

[8] The Executive Branch of the Florida state government obtains its pardoning power by constitution and statute. See Florida Const. Art. 4, § 8 (1964) and Fla. Stat. § 940.01 et seq. (1970). The pardon would federally have to be accorded the same recognition as the granting state would accord it under full faith and credit statute, 28 U.S.C. § 1739, providing in part that state non-judicial records "shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts or offices of the State, Territory, or Possession from which they are taken." *Taran v. United States*, 266 F.2d 561, 566 (8th Cir. 1959).

Petitioner's prior conviction voided by pardon was used for impeachment in a situation where its use might well have affected the outcome of his trial. The defense was entrapment. The government, although not calling the informer to refute petitioner, argued that petitioner was not telling the truth when he said he was induced to commit the crime by the informer's activities. The impeachment was crucial to credibility and certainly contributed to the jury's rejection of the entrapment defense. Under the principle of *Loper* v. *Beto*, the impeachment constituted a denial of due process of law.

Now after *Burgett* and *Loper*, this Court should grant certiorari to decide generally the effect of a full pardon on impeachment and particularly the effect to be accorded a state pardon which by operation of law voids prior convictions. Existing circuit court opinions upholding impeachment by a pardoned conviction conflict with this Court's language in *Ex Parte Garland* and the principles followed in *Burgett* and *Loper*. The issue is important because impeachment by a prior conviction is fraught with the potential for an unnecessary prejudice to the accused and should be narrowly construed. At least, the Court should take the opportunity to declare that when a state chooses to exercise the full extent of its clemency power and remove all vestiges of criminal conviction by pardon, federal courts should extend full faith and credit to that executive decision. Florida has decided that the possibility of complete rehabilitation in the eyes of society is a strong stimulus for convicted felons to remake their lives. When one does, the state blocks out the guilt and views him as a new man. To permit impeachment by that voided conviction in any court

flatly contradicts this salutary state policy. Rule 609(c) of the Proposed Rules of Evidence for United States Courts and Magistrates (March 1971) reflects a similar policy and would not allow impeachment by a felony subject to a pardon.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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APPENDIX

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2390

Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

JOE RUSSO, HAROLD S. RODOVICH,
ARTHUR C. WADE AND HASSAN J. HOLET,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

(February 22, 1972)

Before WISDOM, GODBOLD and RONEY,
Circuit Judges.

GODBOLD, Circuit Judge: The evidence in this case showed that in late September 1970 defendant Rodovich and a friend, Calarusse, passed approximately $2,000 in counterfeit money on a trip from Miami to Connecticut and were arrested in Connecticut. The Connecticut charges relate to this case only in an evidentiary sense.

The two returned to Miami, and Calarusse began to cooperate with United States Secret Service Agents. He arranged for a meeting on October 1 between Rodovich

* Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al, 5th Cir. 1970, 431 F.2d 409, Part I.

and undercover agent Ward, who at that meeting made a buy from Rodovich of $2,060 counterfeit currency. Ward negotiated with Rodovich for a larger buy at a future time. Rodovich revealed that he was dealing with an out of town source of supply but mentioned no names. Thereafter Rodovich, not knowing that he was dealing with Secret Service Agents, communicated directly with Ward and a second undercover agent, D'Amelio, who Ward introduced to Rodovich as his (Ward's) source of funds to buy the bogus money.

As a result of these dealings, a large buy was arranged for November 10 at the Miami airport. Rodovich, Ward and D'Amelio met at the terminal. Rodovich made a telephone call from a pay phone, and after a few minutes received a call at that same phone. He then told the agents the money was being brought to the airport. About 45 minutes later, and immediately after a car identified only as bluish in color had stopped at the terminal door, Russo and Holet entered the terminal bearing a suitcase which, it later developed, contained $250,000 of counterfeit bills. They met Rodovich, and the suitcase was put in a locker. While Holet and Russo remained close by, Rodovich took Ward to the locker and they examined the contents of the suitcase. Rodovich, Ward, and D'Amelio then went to another locker nearby where genuine money to make the buy had been placed. As the three of them were at this locker, and Russo and Holet were standing nearby, Wade entered and approached Holet and asked, "How did everything go? Did you get the money yet?" A few moments later the numerous surveiling agents arrested the four defendants and made sham arrests of the two undercover men.

Wade was searched and found to have in his pocket a slipe of paper with the telephone number of the pay station at which Rodovich had made and received his calls, and car keys which were found to be those for Russo's blue car, parked at the airport.

All defendants were convicted of conspiracy to violate the counterfeit laws. Rodovich was convicted also of possessing and delivering the $2,660 which he sold to Ward on October 1. Russo was convicted also of possessing two bogus bills found in his pocket when he was arrested.

Rodovich asserted the defense of entrapment and on appeal claims there was entrapment as a matter of law. He took the stand and testified only as to his dealings with Calarusse which led to the October 1 sale to Ward. On cross-examination he admitted passing counterfeit money on the trip to Connecticut with Calarusse.

Rodovich was not, as a matter of law, entrapped. There was sufficient evidence of governmental inducement to put upon it the burden of proving that the inducement did not overpersuade or undermine the will of an unwilling man. But the evidence of predisposition, in the form of passing counterfeit money during the trip to Connecticut, was sufficient to carry the entrapment issue to the jury. *Pierce v. U.S.*, 414 F.2d 163 (5th Cir.), *cert. denied*, 396 U.S. 960, 24 L.Ed 2d (1969).

There was no error in the denial of severance motions made by the other three defendants after Rodovich made known that he would rely upon the defense of entrapment, which, under the law in this circuit, prevented him from denying the acts constituting the offense. The fact that a co-defendant, charged as a co-conspirator, pleads entrapment does not alone require the trial judge to serve all others charged with the conspiracy. Rodovich testified to nothing occurring after October 1, and he did not mention Wade, Hulet or Russo in his testimony. The government asked him no questions about the airport meeting, or any other questions tending to implicate Rodovich with any of the other three defendants. Thus, while the entrapment defense barred Rodovich from denying the commission of acts constituting the offense, at no point did he make affirmative statements implicating any of the other defendants.

Also Wade, Russo and Holet would have been little, if any, better off had any one or all been tried separately. The evidence still would have placed all at the airport under the surveillance of a number of agents, in a meeting in which Rodovich was caught red-handed, receiving from two of them a delivery of counterfeit money and in turn delivering it to the two undercover men. The possibility of Rodovich's not being called to the stand in a separate trial could have no real possibility of affecting the result.

Wade suggests that Rodovich's taking the stand to testify in support of the entrapment defense emphasized his own failure to take the stand to explain his presence at the airport. This contrast is true as to any codefendant and hardly justifies a severance. The same attorney represented Rodovich and Wade. In an abstract sense there was a conflict between Rodovich's interest in testifying as a predicate to his entrapment defense and Wade's interest in Rodovich's remaining silent. But, for the same reasons already dismissed, the conflict had only the most remote possible effect on Wade—speaking or silent, Rodovich had been caught in the act. Also on two occasions during Rodovich's testimony the trial court, upon request, told the jury that the testimony was to be considered only as to Rodovich. There was no *De Luna* problem'—the counsel for Wade and Rodovich drew no attention to Wade's failure to testify. There was no abuse of discretion in refusing severance as to any of the defendants. *U.S.* v. *Levrie*, 445 F.2d 429 (5th Cir. 1971).

Wade's approach to Holet at the airport, and the question addressed by him to Holet, gave probable cause to arrest Wade. The subsequent search of Wade was, therefore, valid.

No other points deserve discussion.

AFFIRMED.

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[1] De Luna v. U.S., 308 F.2d 140 (5th Cir. 1962).

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2390
Summary Calendar *

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

JOE RUSSO, HAROLD S. RODOVICH,
ARTHUR C. WADE AND HASSAN J. HOLET,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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(March 21, 1972)

On Petition for Rehearing

Before WISDOM, GODBOLD and RONEY, *Circuit Judges.*

PER CURIAM:

IT IS ORDERED that the petition for rehearing on behalf of Harold S. Rodovich and Arthur C. Wade filed in the above entitled and numbered cause be and the same is hereby DENIED.

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1515

HAROLD S. RODOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with three co-defendants in the United States District Court for the Southern District of Florida, petitioner was convicted on one count of having conspired to violate the counterfeiting laws, and on two substantive counts of having possessed and delivered $2,660 in counterfeit money on October 1, 1970, in violation of 18 U.S.C. 371, 472 and 473. He was sentenced to concurrent prison terms of five years for the conspiracy and ten years for the sub-

stantive offenses. The court of appeals affirmed (Pet. App. 1a-4a). Petitioner's primary defense was entrapment.

The evidence showed that in September 1970 petitioner and Michael Calarusse passed approximately $2,000 in counterfeit United States currency during a trip from Miami to Connecticut. They were arrested for this when they reached Connecticut, but were permitted to return to Miami. After Calarusse arrived in Miami on September 22, 1970, Secret Service agents asked him to cooperate with them and to determine whether petitioner had any more counterfeit money to sell (J.A.[1] 391-394, 536-537, 541-542). Calarusse agreed; according to the agents who supervised his activities, he was given no promises but was motivated by a hope of reward for his cooperation (J.A. 393, 463-464).[2]

On September 28, 1970, Calarusse reported that petitioner did have some counterfeit money to sell at fifty percent of the face value. He was instructed to tell petitioner that he had found a buyer (J.A. 400-401). On October 1, 1970, Calarusse telephoned petitioner and arranged a meeting for that afternoon. At the meeting, Calarusse introduced petitioner to the buyer who was in fact a federal agent, Ward. Following some bargaining, petitioner agreed to sell Ward $2,660 in

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[1] "J.A." refers to the Joint Appendix filed in the court of appeals and lodged with the Clerk of this Court, which contains the transcript of the trial.

[2] There was conflicting testimony by federal agents as to whether Calarusse was paid for his information (J.A. 412-413, 462).

counterfeit money for $950. The two men then went to petitioner's car where petitioner gave the agent $2,660 in counterfeit twenty-dollar bills. The agent gave petitioner $950. (J.A. 116-117, 125-126, 402, 461-462). The two men returned to the bar and conversed about future purchases of counterfeit notes. Petitioner indicated that if the agent ordered a large enough quantity, such as $100,000, the price would come down to twenty percent. In response to questions, petitioner stated that it would take some time to get the money since it was coming from out of town. Ward gave petitioner a telephone number at which he could be reached when the money was available (J.A. 126, 131-132).

Between October 1 and November 8, Ward and another undercover agent, D'Amelio, maintained contact with petitioner (J.A. 132, 175-176). On November 8, petitioner telephoned D'Amelio saying that he was getting $250,000 in counterfeit money. He asked D'Amelio whether he could "use" any more than the $100,000 previously ordered. D'Amelio agreed to buy another $25,000 at twenty percent. On the next day, petitioner called D'Amelio and told him to come to Miami immediately since he had the counterfeit money and indicated that the transfer could take place on November 10. D'Amelio and Ward went to Miami and arranged surveillance with other agents. (J.A. 211-215).

After meeting the undercover agents as arranged, petitioner made a telephone call. About forty-five minutes later two men arrived carrying a suitcase.

Petitioner took Agent Ward to inspect the suitcase which was later found to contain $250,000 in counterfeit bills. Shortly thereafter petitioner and the two men who had delivered the suitcase were arrested (J.A. 136-141, 312-320).

At the trial petitioner asserted the defense of entrapment. He testified that in late September 1970 Calarusse came to his home and told him that he desperately needed money to keep his family from being evicted and to pay back a loan shark from whom he had borrowed; that Calarusse entreated him over a period of several days to engage in a sale of counterfeit bills and that as a direct result of these importunings, petitioner agreed to do so (J.A. 520-521, 526-527). Calarusse was present at the trial in response to a defense subpoena (J.A. 523) but was not called to testify.

On cross-examination petitioner was asked whether he had ever been convicted of a felony. He said no, whereupon his attorney came to the bench and explained that the answer was at his direction, that petitioner had been convicted but had been granted a full pardon. The judge ruled that the fact of the conviction could be used for impeachment both because the denial of the felony was a misstatement and because a pardoned conviction can still be used for impeachment. (Pet. 8-9). The prosecutor then repeated his question before the jury, and petitioner replied that he had been convicted of a felony but had received a full pardon (J.A. 538-541).

1. Petitioner contends that the evidence established entrapment as a matter of law. As the court of ap-

peals held, however, there was sufficient evidence of petitioner's predisposition to warrant submission of the issue to the jury. See *Masciale* v. *United States*, 356 U.S. 386. Petitioner had passed counterfeit money in Connecticut shortly prior to being approached by Calarusse. Moreover, petitioner's negotiations with the undercover agents and the obtaining of a large quantity of counterfeit money from an outside source all indicated that petitioner was no amateur in these matters. Although petitioner testified that he had been beseeched by Calarusse to engage in the initial transaction involving $2,660, the jury need not have believed that testimony and at any rate did not have to credit the assertion that petitioner had been unwilling to engage in the illegal activity and had been persuaded to do so by Calarusse.

Petitioner's reliance on cases such as *Greene* v. *United States*, 454 F.2d 783 (C.A. 9); *United States* v. *Bueno*, 447 F.2d 903 (C.A. 5); and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Calif.), is misplaced. The *Bueno-Chisum* line of cases deals with the different situation where government agents furnish all or part of the means to commit the offense.[3] Here, by contrast, it was petitioner who supplied the counterfeit money. In *Greene*, *supra*, the court found that, on the unique facts of that case, the govern-

[3] *United States* v. *Russell*, No. 26,485, C.A. 9, decided April 6, 1972, pending on petition for a writ of certiorari, No. 71-1585, relied on by petitioner (Pet. 14-15), is similar to *Bueno* and *Chisum* in that there the undercover agent supplied one of the chemicals needed by the defendant to manufacture an illicit drug.

ment had indulged in too great a degree of participation in the crime irrespective of the absence of traditional entrapment since the defendant was predisposed to commit the offense.[4] No such factual situation is presented by this case. The attempt to arrange additional purchases bears no resemblence to *Greene* and was, in any event, a reasonable way to attempt to ascertain the identity of others involved in the counterfeiting.

2. Relying on *Loper* v. *Beto*, No. 70-5388, decided March 22, 1972, which held it reversible error to use a prior conviction for impeachment where the conviction was void because the defendant had been denied the right to counsel, petitioner contends that it was error to permit his impeachment by reference to a felony conviction for which he had received a full pardon. It is settled, however, that a pardon (unless granted, as not shown here, on the ground of innocence) does not have the effect of erasing a conviction *ab initio*, and thus does not prevent the use of that conviction for impeachment in the federal courts. *E.g.*, *Gurleski* v. *United States*, 405 F.2d 253, 266 (C.A. 5), certiorari denied, *sub nom. Smith* v. *United States*, 395 U.S. 977; *United States* v. *Denton*, 307 F.2d 336, 339 (C.A. 6), certiorari denied, 371 U.S. 923; *Richards* v. *United States*, 192 F.2d 602 (C.A.D.C.), certiorari denied, 342 U.S. 946.

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[4] *Williamson* v. *United States*, 311 F. 2d 441 (C.A. 5), also involved a special factual situation—a contingent fee arrangement with an informer to produce evidence against a certain named defendant for crimes not yet committed—not posed by the facts of this case.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JUNE 1972.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1515

HAROLD S. RODOVICH, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an Order (1) vacating its denial of the Petition for Writ of Certiorari entered on October 10, 1972, and (2) granting the Petition. As grounds for this Motion, petitioner states the following.

The Grant Of Certiorari In Russell v. United States, No. 71-1585

On October 16, 1972, following denial of certiorari in the instant case, this Court granted certiorari in *Russell* v. *United States*, No. 71-1585, ruling below, 459 F.2d 671 (9th Cir. 1972). The question presented in *Russell* [1] calls upon this Court to reconsider the parameters of the traditional entrapment defense. In particular, the decision in *Russell* will undoubtedly clarify a problem which has previously seriously divided the Court, namely, the proper balance between entrapment's foci of concern—the government's conduct producing the crime and the accused's predisposition to commit the crime. *Lopez* v. *United States*, 373 U.S. 427, 434 (1963). See *Sorrells* v. *United States*, 287 U.S. 435 (1932) and *Sherman* v. *United States*, 356 U.S. 369 (1958). In *Russell*, the Ninth Circuit noted a series of lower federal court decisions finding entrapment when the government conduct was particularly reprehensible irrespective of the predisposition of the accused [2], and then ruled that the activity of a government agent supplying the necessary means for the commission of an offense to an obviously predisposed accused was entrapment as a matter of law. 459 F.2d at 674.

In the instant case, petitioner sought unsuccessfully to obtain a finding of entrapment as a matter of

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[1] The question presented: "Was defendant predisposed to commit an offense afforded entrapment defense by government agent's act of furnishing necessary means for commission of offense?" 41 LW at 3198.

[2] *Greene* v. *United States*, 454 F.2d 783 (9th Cir. 1971); *United States* v. *Bueno*, 447 F.2d 903 (5th Cir. 1971); *Williamson* v. *United States*, 311 F.2d 441 (5th Cir. 1962); *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal. 1970).

law on the basis of uncontradicted evidence of overzealous government conduct countered only by one episode of recent similar criminal conduct on his part offered to prove predisposition. The court of appeals held that the evidence of predisposition was sufficient to present a jury question. Petitioner sought certiorari relying on the authorities cited above as well as the Ninth Circuit *Russell* opinion. See Petition at 12-19. In its Memorandum in Opposition to the Petition, the United States attempted to distinguish the issue raised from its then pending Petition in *Russell* on grounds that these authorities were limited to certain unique fact patterns. See Memorandum at 5-6. In particular, the government argued that the rationale of the *Bueno-Chisum* line of cases culminating in *Russell* is confined to situations where government agents supply all or part of the means to commit an offense.

This distinction is without substance. Following Justice Frankfurter's observation that "[w]hat police misconduct is to be condemned . . . must be picked out from case to case as new situations arise . . .,"[3] those courts disregarding the *Sorrells* innocence requirement have not just responded to a single category of government conduct. On the contrary, the law enforcement areas involved have included regulation of narcotics, liquor and counterfeiting offenses, and the objectionable government activity has varied. In *Chisum, Bueno* and *Russell,* it was the government supplying the defendant with the item, possession of which constituted the crime; in *Greene,* it was reactivating criminal conduct after an arrest, and subsequent extended and active involvement in the criminal conduct; and in *Wil-*

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[3] *Sherman* v. *United States,* 356 U.S. at 384 (Frankfurter, J. concurring.)

liamson, it was a contingent fee arrangement with an informer. And most recently, in *United States* v. *McGrath,* 12 CrL 2072, (7th Cir. decided September 26, 1972), a court condemned extensive participation by government agents in a counterfeiting scheme despite the defendant's predisposition evidenced by his embarking on the counterfeiting scheme prior to government intervention. The *McGrath* Court concluded:

> An approach which focuses on the defendant's predisposition may not be adequate to deal with situations involving solicitation of those with criminal records who may be more amenable to inducement, those involved in minor crimes who by official encouragement move on to larger ones, or those, like McGrath, who have embarked on a criminal venture that may never have been completed without official aid. Other courts have reacted similarly when confronted with cases of this genre. 12 CrL at 2073.

Without repeating the factual development of the Petition, a cursory review of the record in the instant case demonstrates the presence of more than one of the types of objectionable government conduct which courts have condemned as entrapment despite the accused's predisposition. In this counterfeiting case, shortly after arresting petitioner and his friend for a similar offense, the government instigated new criminal activity by employing the friend as an agent/informer to arrange a new transaction; the agents knew the agent/informer was acting in hope of reward and subsequently rewarded him; the agent/informer used his friendship and personal appeals for sympathy to overcome petitioner's initial resistance to the new criminal solicitation; and, finally, the agents created and actively participated in one counterfeiting crime in order to

produce and participate in a second, larger crime which became the subject of the prosecution.

Thus, the close identity of the issues in this case and in the *Russell* case amply justifies a reconsideration of the denial of certiorari. By granting this Petition and hearing the case simultaneously with *Russell,* this Court would have a vehicle for more complete treatment of the entrapment issues which have plagued lower federal courts. At the very least, reconsideration is justified in order to hold this case open pending decision in *Russell* because if that decision recognizes the approach of the Ninth Circuit, then identical issues preserved by this Petition and contemporaneously pending would be affected.

CONCLUSION

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, petitioner prays that this Court grant rehearing of the Order of Denial, vacate the Order, grant the Petition and review the judgment and opinion below.

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CERTIFICATE OF COUNSEL

As counsel for the Petitioner, I hereby certify that this Petition for Rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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